MAHENDAR SUCHA SINGH & ANOR *a*

v.

EMILE JOSEPH

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-448-1998]
17 APRIL 2000

CIVIL PROCEDURE: *Action - Limitation period - Commencement - Whether from date of infringement or threat of infringement of plaintiffs' right under agreement* *c*

CIVIL PROCEDURE: *Action - Res judicata - Dismissal of two previous suits with similar parties - Whether res judicata applicable*

CIVIL PROCEDURE: *Jurisdiction - High Court - Case referred to court involved dispute with registered society - Whether case should be referred to Registrar-General of Cooperative Societies - Whether court could hear matter - Cooperative Society Act 1948 & Cooperative Society Act 1993* *d*

The defendant applied to strike out the plaintiffs' action under O. 18 r. 19(1)(a), (b) or (c) of the Rules of the High Court 1980 ('RHC'). The Senior Assistant Registrar ('SAR') ruled that the plaintiffs' statement of claim disclosed a reasonable cause of action. As such, it was not a plain and obvious case to warrant a striking out. However, thereafter the SAR delivered another decision in respect of the same in which she dismissed the plaintiffs' writ and the statement of claim on the basis that the court had no jurisdiction to hear the matter. The defendant appealed against the former decision of the SAR whilst the plaintiffs appealed against the latter decision. *e* *f*

The plaintiffs were the legal administrator of the estate of one, Daljit Singh, deceased, who commenced an action against the defendant, the liquidator of a cooperative housing society ('IRICHS'). IRICHS' main line of business was to buy a piece of land and sub-divide it into individual lots to sell to its members with a bungalow on each lot. Daljit Singh purchased a ready built bungalow that sat partly on a piece of land and substantially on another piece of land. It was understood and agreed that IRICHS would carry out the necessary sub-divisions in order to ensure that Daljit Singh obtained a fair proportion of the land on which the bungalow was built upon. However, the plaintiffs discovered later that the defendant had taken steps to sell the piece of land that the bungalow sat substantially upon. The plaintiffs then filed the civil suit against the defendant. *g* *h* *i*

IRICHS had since been wound up by an order from the Registrar of Cooperative Societies under the Cooperative Society Act 1948 ('the 1948 Act'). The 1948 Act was repealed and it was replaced by the Cooperative Society Act 1993 ('the 1993 Act'). The defendant averred that by virtue of the 1948 Act or the 1993 Act the jurisdiction of the court was ousted. That was because since the late Daljit Singh's dispute with the IRICHS commenced when he was still alive and also at the time when IRICHS was still in existence and that very dispute continued even after the dissolution of IRICHS, then two different sets of laws applied to the two different periods of time. The defendant also claimed: (i) that the plaintiffs' action was barred by limitation; and (ii) that the doctrine of *res judicata* was applicable in favour of the defendant in view of the dismissal of two previous suits filed by the plaintiffs as there were similarities between the parties therein with the parties in the present proceedings.

Held:

[1] Time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the plaintiffs' right under the agreement. Based on this test, the winding-up of IRICHS on 16 July 1982 could not be said to be an infringement or threat of infringement of the plaintiffs' rights and it could not be taken as the time when limitation ran. However, the defendant by putting up the said piece of land for sale by tender had in effect infringed or threatened to infringe the rights of the plaintiffs. The cause of action or the right of action began at the time when the defendant placed advertisements in the local newspapers and that would be between 5 July 1998 to 10 July 1998. That meant that the plaintiffs' claim filed on 29 July 1998 was not barred by limitation.

[2] The 1948 Act should be the correct piece of legislation to govern the first period. The specific remedy available to the plaintiffs under s. 49 of the 1948 Act must be resorted to. However, this court had no jurisdiction to adjudicate on the matter. The Registrar-General of Cooperative Societies by statute was empowered to handle the dispute between the parties and this court should not enter into the arena at all. Section 49 expressly uses the words "If any dispute touching the business of a registered society" and that dispute must surely refer to the dispute at the point of time before the dissolution of IRICHS with the late Daljit Singh when the latter was still alive.

[3] After the dissolution of IRICHS, the 1993 Act would come into play. Section 74 of the 1993 Act enacts that if the registration of a registered society is revoked under s. 71 or s. 72, the Registrar-General may appoint a competent person to be a liquidator of the registered society. Of crucial importance would be s. 82(1) of the 1993 Act which are similarly worded

with that of s. 49 of the 1948 Act where disputes shall be referred to the Registrar-General for decision.

[4] The ouster provisions in both the 1948 Act and the 1993 Act must be vigorously applied in favour of the defendant. When so applied, the plaintiffs' statutory remedy should lie with the Registrar-General of Co-operative Societies. Thus, on the question of jurisdiction, the SAR rightly decided that the court had no jurisdiction to hear the matter.

[5] On the authorities and on the facts of the present proceedings, the doctrine of *res judicata* should be applied in favour of the defendant. There should be an end to litigation. Vexatious litigations would certainly be against public policy. The plaintiffs' writ must be struck out forthwith.

[Defendant's appeal allowed; plaintiffs' appeal dismissed.]

Case(s) referred to:

Alias bin Ismail v. Hairuddin bin Mohamad & Anor [1997] 3 MLJ 724 ***(refd)***
Arah Cipta Sdn Bhd v. Kian Kee Sawmills (M) Sdn Bhd [1997] 2 MLJ 513 ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 ***(refd)***
Carl Zeiss Stiftung v. Rayner & Keeler & Ors (No 2) [1967] 1 AC 853 ***(refd)***
Cutler v. Wandsworth Stadium Ltd [1949] 1 All 55 ***(refd)***
Doe d Bishop of Rochester v. Bridges [1831] 1B & AD 847 ***(refd)***
Gasing Heights Sdn Bhd v. Aloyah bte Abd. Rahman & Ors [1996] 3 MLJ 259 ***(refd)***
Hii Teng Tuong, Alphonsus v. Lok Min Wah & Ors [1995] 4 MLJ 259 ***(refd)***
Ibrahim Mohamad v. Ketua Polis Daerah Johor Bahru & Ors [1996] 5 MLJ 15 ***(refd)***
Kersah La'usin v. Sikin Menan [1966] 2 MLJ 20 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 2 MLJ 565 ***(refd)***
M Arulandan v. Malaysian Co-operative Insurance Society Limited [1987] 1 CLJ 43 ***(refd)***
Manggai v. Government of Sarawak & Anor [1970] 2 MLJ 41 ***(refd)***
Metal Industry Employees Union v. Registrar of Trade Unions & Ors [1976] 1 MLJ 220 ***(refd)***
Munah v. Fatimah [1968] 1 MLJ 54 ***(refd)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 ***(refd)***
Pasmore v. Oswaldtwistle Urban District Council [1898] AC 387 ***(refd)***
Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd [1996] 4 MLJ 489 ***(refd)***
Peck v. Russell [1923] 4 FMSLR 32 ***(refd)***
Premier Automobiles Ltd. v. Kamalakar Shantaram AIR [1975] SC 2238 ***(refd)***
Professor Dr A. Kahar Bador & Ors v. N Krishnan & Ors (No 2) [1983] 1 MLJ 412 ***(refd)***
R. v. Surrey Quarter Sessions, ex p Commissioner of Metropolitan Police [1963] 1 QB 990 ***(refd)***
RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors [1991] 1 MLJ 309 ***(refd)***
Rohtas Industries Ltd v. Rohtas Industries Staff Union AIR [1976] SC 425 ***(refd)***

S Manickam & Ors v. Ismail bin Mohamed & Ors [1997] 2 MLJ 90 ***(refd)***
Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd [1996] 2 MLJ 238 ***(refd)***
Shaik Zolkiffly Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff Sheik Latiff, deceased v. Majlis Agama Islam Pulau Pinang and Seberang Perai [1997] 3 MLJ 281 ***(refd)***
Tan Swee Lan v. Engku Nik Engku Muda & Ors [1973] 2 MLJ 187 ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 MLJ 479 ***(refd)***
Thanaraj Manikam & Ors v. Lower Perak Tamil Co-operative Society [1997] 4 MLJ 82 ***(refd)***
Uddin v. Associated Portland Cement Manufacturers, Ltd [1965] 2 QB 582 ***(refd)***
Williams v. Greatrex [1956] 3 All ER 705 ***(refd)***
Wilkinson v. Barking Corporation [1948] 1 KB 721 ***(refd)***
Wong Sai Tack v. Chien Hon Keong [2000] 1 CLJ 195 ***(refd)***
Zakaria Mohamed Esa v. Dato Abdul Aziz Ahmad & Ors [1982] 2 MLJ 222 ***(refd)***

Legislation referred to:
Cooperative Society Act 1948, s. 49(1)
Cooperative Society Act 1993, ss. 71, 72, 74, 75(1)(a) - (p), (3), (5), 82(1)
Limitation Act 1953, s. 19
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c)
Trade Unions Ordinance 1959, s. 2(2)

Betting and Lotteries Act 1934 [UK], s. 11(2)
Public Health Act 1875 [UK], ss. 15, 299

Other source(s) referred to:
A Manual of Co-operative Law And Practice, 4th edn, p 186

For the plaintiffs - Avinder Singh Gill; M/s AJ Ariffin, Yeo & Harpal
For the defendant - S. Kanawagi; M/s Khana & Co

JUDGMENT

Abdul Malik Ishak J:

Enclosure 25

This was an application by way of a summons in chambers filed by the defendant to strike out the plaintiffs' action with no liberty to file afresh under O. 18 r. 19(1)(a) or (b) or (c) of the Rules of the High Court 1980 ("RHC") and/or under the inherent jurisdiction of the court. The defendant also prayed for the costs of the action and the costs of the application to be borne by the plaintiffs. The defendant too sought for any other relief that the court deemed fit. The senior assistant registrar ("SAR") heard the application in encl. 25 twice. Firstly, on 16 November 1999, the SAR ruled that the plaintiffs' statement of claim disclosed a reasonable cause of action. The SAR was of the view that it was not a plain and obvious case to warrant a striking out because the allegations in the plaintiffs' statement of claim raised serious questions to be tried. In short, the defendant's application was dismissed by

the SAR. Secondly, on 30 November 1999, the SAR delivered another decision in regard to encl. 25 and on that date she dismissed the writ and the statement of claim with costs for the simple reason that the court had no jurisdiction to hear the matter. This meant that the defendant's application was allowed by the SAR.

Being dissatisfied, the defendant filed an appeal to the judge in chambers against the decision of the SAR that was delivered on 16 November 1999 as seen in encl. 30. The plaintiffs too were most unhappy with the decision of the SAR that was delivered on 30 November 1999 and they lodged an appeal to the judge in chambers as seen in encl. 32.

The decisions of the SAR in regard to the application of the defendant in encl. 25 were at divergence with one another. On the one hand, the SAR decided not to strike out the plaintiffs' claim because it raised serious questions to be tried and, on the other hand, the SAR saw it fit to dismiss the plaintiffs' claim because the court had no jurisdiction to hear the case.

Now, encl. 25 was drafted by citing O. 18 r. 19(a), (b) or (c) of the RHC which clearly was in error as it should be "O. 18 r. 19(1)(a) or (b) or (c) of the RHC." There was clearly an omission to cite "para. (1)" after r. 19 and there was also an omission to add the disjunctive word "or" before para. (1)(b) of r. 19. The word "or" has always meant to be read disjunctively (*Uddin v. Associated Portland Cement Manufacturers, Ltd* [1965] 2 QB 582; and *R. v. Surrey Quarter Sessions, ex p Commissioner of Metropolitan Police* [1963] 1 QB 990) and our RHC too must be read accordingly. There should not be an exception in the context of our O. 18 r. 19 of the RHC. Since the plaintiffs were also relying on para. (1)(a), no evidence shall be admissible to strike out under this ground (*Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad & Ors* [1982] 2 MLJ 222) and this must surely mean that affidavit evidence too is inadmissible and should not be considered at all (*S Manickam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90; *Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, FC; *Shaik Zolkiffly bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased v. Majlis Agama Islam Pulau Pinang and Seberang Perai* [1997] 3 MLJ 281; *Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd* [1996] 4 MLJ 489; and *Hii Teng Tuong, Alphonsus v. Lok Min Wah & Ors* [1995] 4 MLJ 259) and all the court needs do is to consider only the pleading and decide whether it should be struck out (*Peck v. Russell* [1923] 4 FMSLR 32) and further the exercise does not involve a minute examination of the various documents and the facts thereto (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, SC). Fortunately, the defendant also relied on r. 19 (1)(b) or (c) of O. 18 of the RHC and this

entailed an examination of the averments in the statement of claim and the statement of defence together with the relevant affidavits filed in relation to encl. 25 (*Gasing Heights Sdn Bhd v. Aloyah bte Abd. Rahman & Ors* [1996] 3 MLJ 259, CA; and *Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238, CA).

Facts Of The Case

The plaintiffs who were the legal administrator of the estate of Daljit Singh claimed against the defendant who was the liquidator of the Ipoh Road Indian Cooperative Housing Society Ltd ("IRICHS") for the following reliefs (see paras. (a) to (d) of the statement of claim in encl. 1):

(a) an injunction against the defendant personally or the agents or servants of the defendant from proceeding with the sale of a piece of land known as GM 11, Lot 10913, Mukim Batu, Negeri Wilayah Persekutuan (hereinafter referred to as the "said piece of land") or to dispose of the said piece of land by whatever means or to dispose partially the said piece of land until disposal of the civil suit by way of a hearing;

(b) an order directing the defendant to make the necessary applications to sub-divide the said piece of land and to transfer the sub-divided part thereof to the plaintiffs;

(c) whatever relief or order that this Honourable Court deems fit and suitable in the circumstances of the case or where the justice of the matter demands it;

(d) costs.

Daljit Singh died on 27 May 1988 and the grant of the letters of administration was extracted on 14 February 1989 as reflected in exh. "AS1" of encl. 8. IRICHS was registered on 20 December 1950 (see para. 3 of the statement of claim) and its main line of business was to buy a piece of land in Ipoh Road, Kuala Lumpur, sub-divide it into individual lots and sell it to its members with a bungalow on each lot (see paras. 3, 4 and 5 of the statement of claim). The approximate size of each lot was 7,000 square feet with a bungalow built on it and it was priced at RM17,500. Before his death, Daljit Singh became a member of IRICHS and in due course he purchased a lot with a bungalow built on it from another member of IRICHS at a price of RM32,000.

IRICHS was de-registered on 16 July 1982 and the defendant was appointed as the liquidator. Upon the death of Daljit Singh, the plaintiffs became his legal administrators. The writ of summons together with the statement of claim were filed on 29 July 1998 and that was the date when the action commenced.

What the late Daljit Singh purchased was a ready built bungalow that sat partly on a piece of land known as G.M. 247, Lot 5013, Mukim Batu, Negeri Wilayah Persekutuan ("GM 247") and substantially that very bungalow was also located on the said piece of land – namely, GM 11, Lot 10913, Mukim Batu, Negeri Wilayah Persekutuan as alluded to earlier. It seemed that at all material times, it was understood and agreed by the officers of IRICHS, that what the late Daljit Singh purchased was approximately 7,500 square feet of land that partly sat on GM 247 and substantially on the said piece of land. The relevant officers of IRICHS, at the material times, were charged with the responsibilities of carrying out the necessary sub-divisions in order to ensure that the late Daljit Singh obtained a fair proportion of the land on which the bungalow was built upon. Unfortunately, due to an error or mistake, this was not done as planned. Instead the late Daljit Singh received about 1,000 square feet of land while the substantial part of the bungalow sat on the said piece of land. To the plaintiffs' dismay, they discovered that the defendant had taken the necessary steps to sell the said piece of land by way of a tender. It was for these reasons, that the present civil suit was filed.

The statement of defence and counterclaim were interestingly worded. The defendant deposed that the administratrix and administrator of the estate of the deceased Daljit Singh were foreign residents. The first plaintiff by the name of Mahendar a/p Sucha Singh is residing in Australia while the second plaintiff by the name of Ajit Singh a/l Milkha Singh is a citizen of Singapore and resided there. The de-registration of IRICHS on 16 July 1982 was escalated when it was wound up by an order from the registrar of cooperative societies on that date and this was due to a statutory power vested in the said registrar under the Cooperative Society Act 1948 ("1948 Act"). Incidentally, the 1948 Act was repealed and it was replaced by the Cooperative Society Act 1993 that took effect on 22 January 1994 *vide* gazette notification dated 20 January 1994, Jilid 28, no: 2, P.U.(B) 37 (hereinafter referred to as the "1993 Act"). The defendant averred that by virtue of the 1948 Act or the 1993 Act, the jurisdiction of the court had been ousted. It was averred that the plaintiffs cannot, in law, sue the defendant in its capacity as the liquidator of IRICHS because the latter had been wound up under the 1948 Act and was thus, no longer in existence under the law. IRICHS was buried by the 1948 Act. The defendant also averred that the plaintiffs have no privity with the defendant in its capacity as the liquidator of IRICHS. It was averred that the plaintiffs' privity were entirely with IRICHS and since the latter had been wound up by the 1948 Act, the plaintiffs' cause of action must necessarily be extinguished. Of crucial importance, was the averment by the defendant to the effect that the plaintiffs' claim were barred by the statute of limitation based on 12 years calculated from the date of the winding up of IRICHS on 16 July 1982. Of crucial importance too were the averments that the plaintiffs in seeking

equitable remedies had delayed in advancing its cause and had come with unclean hands and this would disentitle them from obtaining any equitable remedies. The defendant also averred that all the rates on the said piece of land had been paid and maintained by the defendant. It was averred that the late Daljit Singh or his predecessor in title had built a bungalow on the said piece of land and had unlawfully encroached onto it without the knowledge, consent or approval of IRICHS. It was also averred that such encroachment amounted to an act of a continuing trespass. The defendant deposed that IRICHS had an indefeasible title to the said piece of land. The defendant averred that on the other adjacent side of the said piece of land comprised a land measuring 15.46 poles belonging to Kartar Kaur d/o Mehar Singh and Krishna Devi d/o Hazara Singh, both of whom being the widow and daughter of Hazara Singh and both of them were the administratrixes of the estate of Hazara Singh – the deceased member of IRICHS. The estate of Hazara Singh claimed one half of the said piece of land and had filed a court action in the High Court of Kuala Lumpur *vide* civil suit no: F379 of 1984 on 28 August 1984 and in that civil suit, the estate of Hazara Singh named the present plaintiffs in the present action as the second joint defendants. On 10 February 1995, that civil suit was dismissed by the High Court of Kuala Lumpur (her Ladyship Rahmah Husein J presiding) and the estate of Hazara Singh filed on 29 April 1998 an appeal to the Court of Appeal *vide* civil appeal no: W-02-111-95 and this very appeal was eventually withdrawn on 9 June 1998. It was averred by the defendant that in the early 1990s while civil suit no: F379 of 1984 was still pending, the present defendant was pressurised by the registrar general of cooperative societies to settle the liquidation early and in order to compromise the dispute, offers were made to the estate of Hazara Singh and Daljit Singh giving them first preference to purchase the said piece of land jointly at the prevailing market price and divide equally among themselves. The offers by the present defendant were rejected outright by both the estates of Hazara Singh and Daljit Singh because they wanted the said piece of land transferred to them without any consideration whatsoever. It was also averred that by reason of the litigation advanced by the estate of Hazara Singh, the present defendant as the liquidator of IRICHS could not complete the liquidation of IRICHS since 28 October 1982 and it was for this reason that the rights of the ex members of IRICHS were held up. It was averred that at no time before the present civil suit was filed did the present plaintiffs claimed or pursued or prosecuted a claim to the said piece of land or part thereof. The defendant also averred that at no time between the period wherein IRICHS was wound up on 16 July 1982 to the time of the death of Daljit Singh on 27 May 1988, did the late Daljit Singh – a court interpreter by profession, make any claim or assertion against IRICHS for the said piece of land. The defendant denied the averment that the plaintiffs submitted a claim for the said piece of land to the defendant. As the defendant was duty bound

to liquidate the assets of IRICHS, it was averred that the defendant placed advertisements in the local newspaper, Utusan Melayu, dated 28 June 1996 and 29 June 1996 calling all parties having claims against IRICHS to submit their claims to the defendant as the liquidator of IRICHS. The plaintiffs did not submit any claim to the defendant at all. The defendant, so it was averred, relied on the doctrine of estoppel. It was averred that the plaintiffs were estopped by *res judicata* from advancing their present claim because of the plaintiffs' inaction of standing by and seeing the estate of Hazara Singh carry out their legal battle and for this inaction it was averred that the plaintiffs were now bound by the decision of the court in regard to the estate of Hazara Singh. The defendant then took the necessary steps to sell by tender the said piece of land by placing advertisements in the local newspapers, namely, the "Star" and the "Malay Mail" between 5 July 1998 to 10 July 1998 and thereby incurred a substantial amount of money in the process. When the plaintiffs came to know of the sale by tender it was averred that the plaintiffs then jumped out of their sleep and commenced this civil suit and obtained an *ex parte* injunction on 29 July 1998 refraining the defendant from carrying out its lawful duty and also set down the matter for an *inter parte* injunction. It was because of the *ex parte* injunction that the defendant was compelled to abort the tender process to sell the said piece of land. The defendant did in fact abort that tender exercise and in the course of which incurred substantial damages. For these reasons, the defendant as the liquidator of IRICHS could not close the liquidation process that was commenced on 28 October 1982 and this meant that the distribution of the properties to the ex members of IRICHS were further held up. The defendant averred that both the plaintiffs being the administratrix and administrator of the estate of Daljit Singh have no personal knowledge of the alleged facts that occurred during Daljit Singh's lifetime and whatever were averred by the plaintiffs in paras. 4, 5, 6, 7, 9, 10, 11, 12, 13, 14 and 15 of the statement of claim were said to be mere speculations and totally hearsays and the defendant put the plaintiffs to strict proof thereon. The defendant then prayed for the dismissal of the plaintiffs' claim with costs.

In regard to the counterclaim, the defendant had this to say. Sometime in the year 1980, when the plaintiffs or their predecessor in title built a single storey bungalow house bearing the address at no: 15, Jalan Khalsa, Batu 3 3/4 Jalan Ipoh, 51100 Kuala Lumpur upon GM 247 and in so building that bungalow the plaintiffs had wrongfully encroached into the said piece of land and had also erected a fence surrounding the said bungalow which also encroached into the said piece of land. It was averred that the plaintiffs have unlawfully occupied and unlawfully continued to occupy the said piece of land belonging to the defendant when the plaintiffs built their bungalow and erected the surrounding fence thereto. It was averred that the plaintiffs by commencing this civil suit have openly shown their intention, unless restrained by this court,

to continue unlawfully occupying the said piece of land wherein the bungalow and the fence were erected. The defendant averred that a registered surveyor will show the degree and the exact area of the encroachment which the plaintiffs had entered on the said piece of land in the course of the trial. For these reasons, it was deposed that the defendant had suffered loss and incurred damages. The defendant then prayed for the following orders:

(a) for an order that damages suffered by the defendant as a consequence of the *ex parte* injunction dated 29 July 1998 be assessed by the SAR and or by a competent officer of the court and be paid by the plaintiffs to the defendant;

(b) a mandatory injunction to compel the plaintiffs to demolish all that portion of the plaintiffs' bungalow bearing the address at no: 15, Jalan Khalsa, Batu 3 3/4, Jalan Ipoh, 51100 Kuala Lumpur and which portion encroached into IRICHS's property held under and in the said piece of land and to remove all the demolished materials, rubbles, debris, etc., from IRICHS's property held under and in the said piece of land within three months from the date of the order or within a time period considered fit by the Honourable Court;

(c) a mandatory injunction to compel the plaintiffs to demolish all the plaintiffs fencing on IRICHS's property held under and in the said piece of land and to remove all the demolished materials, rubbles, debris, etc., from IRICHS's property held under and in the said piece of land within three months from the date of the order or within a time period considered fit by the Honourable Court;

(d) an injunction to restrain the plaintiffs by themselves or their servants, agents, family members, tenants, assignees or otherwise howsoever from remaining on or continuing in occupation of the defendant's property held under and in the said piece of land;

(e) damages;

(f) that the costs of this suit be paid by the plaintiffs to the defendant;

(g) such further and/or other relief that this Honourable Court deems fit to grant.

The affidavit in support of encl. 25 was affirmed by the defendant on 10 August 1999 as seen in encl. 24 and its contents and averments touched on the questions of jurisdictional point and limitation and they were akin to what had been alluded to in the statement of claim. The plaintiffs through the second plaintiff affirmed an affidavit in reply on 27 August 1999 as seen in encl. 27 and generally it said that the issues raised by the defendant were

the very same ones that were raised during the hearing of the *inter partes* injunction.

So much for the facts and now to the issues raised by the parties.

Enclosure 30 And The Issues Of Limitation And Laches

Section 19 of the Limitation Act 1953 (Revised 1981), Act 254, enacts as follows:

> For the purposes of the provisions of this Act relating to actions for the recovery of land an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

and this very section was vigorously applied by the defendant through its learned counsel Mr. S. Kanawagi to drive home the point that limitation had set in. It must be recalled that IRICHS was de-registered on 16 July 1982 and using this as a baseline plus 12 years would make it to be 15 July 1994, so submitted Mr. S. Kanawagi. From 15 July 1994, Mr. S. Kanawagi then added the period between the death of the late Daljit Singh on 27 May 1988 on the date of the grant of the letters of administration on 14 February 1989 and this came up to 8 months 17 days. From the mathematical point of view, Mr. S. Kanawagi submitted that 8 months 17 days added onto 15 July 1994 would give the date to be 2 April 1995 and this was the date wherein the plaintiffs should file their writ of summons and the statement of claim. Instead it was only on 29 July 1998 that the plaintiffs filed their writ of summons and the statement of claim. The delay calculated from 2 April 1995 to 29 July 1998 came up to three years three months 27 days, so submitted Mr. S. Kanawagi. On the question of limitation, Malek Ahmad JCA (now FCJ) speaking for the Court of Appeal in *Alias bin Ismail v. Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724 CA said at p. 728 to p. 729 of the report:

> In the instant appeal, it is not disputed that the appellant had taken more than three years to file the action. The incident took place in 1987 but the suit was filed only in 1996, some nine years later. Even if we were to take the date he received the letter of approval to file the action, which should not be the case, the relevant date was 12 November 1991 and he would still be out of time.
>
> The court has no discretion to set aside a defence of limitation. In *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019, it was held that it was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show that the plaintiff's cause of action was statute barred and must inevitably fail for that reason.
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> This had been followed by the Federal Court in *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207 and *Haji Hussin bin Haji Ali & Ors*

v. Datuk Haji Mohamed bin Yaacob & Ors; and connected cases [1983] 2 MLJ 227.

In *Tio's* case, the relevant extract of the Federal Court's judgment states (at p 209):

> The arguments for and against the summons have not been incorporated in the record but the learned judge agreed with the government. He delivered an admirable judgment which we do not pretend we can better and which we therefore reproduce:
>
> > The breach alleged by the plaintiffs, if there was such a contract, had occurred more than six years ago. The plaintiffs in their affidavit in opposition made by Tio Chee Hing say to the effect that the Limitation Ordinance does not apply to their case because they were only aware that they could sue the present state government in 1977 and because the agent of the defendants had as late as 25 November 1978, demanded payment of quit rents. These, in my opinion, are not facts which would make the Limitation Ordinance inapplicable to the plaintiff's action.
> >
> > It was a settled rule of practice in England that a party relying upon the statute of limitations must plead it as a defence specifically. The defence was not available, and it was no part of the duty of the court to take notice of the statute of limitations, unless it was specifically pleaded. On the authorities such as *Murray v. Secretary of State for India* [1931] WN 91 and *Dismore v. Milton* [1938] 3 All ER 762, it was not possible for the defendant to apply under O. 25 r. 4 of the Rules of the Supreme Court to have the claim struck out where it appeared from the statement of claim that the plaintiffs' cause of action arose at a time before the period prescribed by the statute of limitations.
> >
> > The practice was that the defendant had to deliver a defence pleading the statute of limitations as a defence specifically. It was then for the plaintiffs to show that the statute was inapplicable. This would be followed by a summons for directions for an issue to be tried.
> >
> > We have, I think, followed this practice in this country.

Recently, the Court of Appeal in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935 considered that the observation in *Dismore v. Milton* went too far. It held, not following *Dismore's* case, that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship, Davies LJ in his judgment at p. 939 said:

> In the light of those more recent authorities, I think, as I say, that perhaps the observations of this court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which had already been barred by the statute of limitations and must fail.

> With respect we entirely agree.

> In *Haji Hussin*'s case, it was held by the Federal Court that where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out. It also ruled that the circumstances in that case would not justify the court exercising its discretion in favour of the appellants where there had been unreasonable vacillation and delay.

> On the limitation point alone, therefore, we saw no merit in this appeal. We did not even find it necessary to call upon the senior federal counsel to reply. Accordingly, we had to dismiss the appeal but considering the circumstances of this case, and with no objections from the learned senior federal counsel, we directed that there should be no order as to costs and that the deposit is to be refunded to the appellant.

In rebuttal, Mr. Avinder Singh Gill for the plaintiffs submitted that it was wrong to compute the issue of limitation from the date when IRICHS was de-registered – which was on 16 July 1982. He submitted that before an action can be instituted there must certainly be a cause of action that had accrued. As authority for this for this proposition he relied on the case of *Nasri v. Mesah* [1971] 1 MLJ 32. That was a case where the appellant claimed for specific performance of an agreement dated 5 June 1947 whereby the respondent agreed to sell him some land belonging to her. The appellant had paid the agreed price for the land but no document of transfer was executed because of the moratorium then in force. After the expiration of the moratorium on 30 September 1949 the appellant approached the respondent on several occasions and requested her to execute a transfer of the land. Eventually the appellant commenced the action on 3 March 1967. The action was dismissed by the High Court judge on the ground of limitation. The appellant appealed. In allowing the appeal, the Federal Court held that whether the action was for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover

land, and the period of limitation therefore would be twelve years. It was further held that time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of the breach and in the case of actions founded on contract, the time runs from the breach.

Gill FJ writing for the Federal Court at p. 34 of the report had this to say:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in *Read v. Brown* [1889] 22 QBD 128, 131). In *Reeves v. Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610, 617 Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (*per* Field J in *Gibbs v. Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case LR 57 I.A. 325). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.
>
> For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land.

Earlier on at p. 33 to p. 34 of the report, his Lordship Gill FJ remarked:

> It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

Having disposed of the question as to the period of limitation in relation to an action for the recovery of land, I must now come to the question as to when such period of limitation begins to run.

In determining this question the learned judge in the court below thought that he had to choose between the conflicting decisions in *Ponnusamy's* case [1959] M.L.J. 86 and *Ng Moh's* case [1969] 1 MLJ 46, both of which were binding on him. The decision of the Federal Court in *Ng Moh's* case was that time did not begin to run until there was an infringement of the appellant's right under the sale agreement. The appellant in that case had sent to Lim Pheng, the then administratrix, a letter dated 15th April, 1955 requiring her to comply with the terms of the agreement within 14 days. The court therefore held that time began to run from 30 April 1955, so that the appellant's counterclaim, which was filed on 16 September 1955, was not barred by limitation. In coming to that decision the court relied entirely on the judgment of the Privy Council in *Bolo v. Koklan* and Ors. R. 57 I.A. 325 in which it was said at p. 331:

> There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

Now, applying the test enunciated by Gill FJ in *Nasri v. Mesah (supra)*, the crucial question to ask would be this: "when did the defendant take any steps that would tantamount to an infringement or a threat of infringement of the plaintiffs' rights?" Indeed when applying this test, the winding up of IRICHS on 16 July 1982 cannot be said to be an infringement or threat of infringement of the plaintiffs' rights and it cannot be taken as the time when limitation runs. It must be recalled that the plaintiffs did not plead in the statement of claim that there was a dispute prior to the liquidation of IRICHS. The plaintiffs also did not plead that there was a dispute at the post liquidation stage. What the plaintiffs pleaded can be seen at paras. 13 and 14 of the statement of claim and they were in the following terms:

> 13. Defendan kini telah mengambil langkah untuk menjual secara tender keseluruhan hartanah yang dipegang di bawah GM 11, Lot 10913, Mukim Batu, Negeri Wilayah Persekutuan.
>
> 14. Plaintif menegaskan dan akan menegaskan bahawa keseluruhan hartanah yang dipegang di bawah G.M. 11, Lot 10913, Mukim Batu, Negeri Wilayah Persekutuan di atas mana bungalow simati terletak patut dan sepatutnya dibahagikan dan dipindahkan kepada waris-waris simati untuk memberi efek kepada pembelian bungalow oleh simati.

and these averments clearly showed that the defendant by putting up the said piece of land for sale by tender had in effect infringed or threatened to infringe the rights of the plaintiffs. It must be recalled that the defendant placed advertisements in the local newspapers, namely, the "Star" and the "Malay

Mail" between 5 July 1998 to 10 July 1998 in order to sell by tender the said piece of land. These advertisements in the local dailies to sell by tender the said piece of land had in effect infringed or threatened to infringe the rights of the plaintiffs. Without further ado, the plaintiffs filed on 29 July 1998 a writ of summons together with the statement of claim to protect and enforce their rights. Thereafter the plaintiffs acted swiftly. On 1 October 1998, before my immediate predecessor, the plaintiffs obtained an *ex partes* injunction to restrain the sale by tender pending trial of this action which injunction had been consented to by the defendant on the date of the *inter partes* hearing. In my judgment, the cause of action or the right of action began at the time when the defendant placed advertisements in the local newspapers and that would be between 5 July 1998 to 10 July 1998. This meant that the plaintiffs' claims were not barred by limitation.

It is interesting to note that the Federal Court in *Tan Swee Lan v. Engku Nik binti Engku Muda & Ors* [1973] 2 MLJ 187 cited and approved the case of *Nasri v. Mesah (supra)*. The facts in *Tan Swee Lan (supra)* may be stated as follows. There the appellant had claimed specific performance of an agreement for the sale of land. The agreement was made on 12 April 1958, and on 2 March 1970 the appellant wrote to the respondents claiming performance of the agreement. On 16 March 1970 the respondent's replied that they were not taking steps to effect the transfer and they challenged the validity of the agreement. The writ was issued on 16 April 1970. The learned trial judge held that the action was statute barred. The learned trial judge also held that as the appellant was not in possession of the land then time would run from the date of the agreement. On appeal to the Federal Court, the appeal was allowed and the Federal Court held that the period of limitation ran from the date that the respondents threatened to infringe the appellant's right by saying that they refused to effect the transfer of the land. The Federal Court also held that it was immaterial that the appellants were not in possession of the land and that being the case the defence of limitation was said to have failed. Ali FJ delivering the judgment of the Federal Court had this to say at p. 188 of the report:

> In the Privy Council case of *Bolo v. Kokland & Ors* LR 57 IA 325; AIR 1930 PC 270 it was stated:
>
> > There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.
>
> This particular passage has influenced the decision of the Federal Court in *Ng Moh v. Tan Bok Kim & Anor* [1969] 1 MLJ 46 which was later followed in *Nasri v. Mesah* [1971] 1 MLJ 32. On these authorities the appellant's contention would seem to be correct.

Further down the same page of the same judgment, his Lordship Ali FJ concluded that:

> Nothing which was said can, however, be taken as suggesting that possession or no possession is a factor for determining the date from which the period of limitation is to run.

The issue of limitation should be decided in favour of the plaintiffs. This however did not mean that there was a reasonable cause of action disclosed in the plaintiffs' statement of claim. Indeed the issue of limitation when viewed in the contexts of the jurisdictional issue and the doctrine of *res judicata*, of which I have more to say in the later part of this judgment, would simply mean that encl. 30 should be allowed with costs. There was no cause of action before the civil court because that cause of action had been extinguished by the doctrine of *res judicata*. The progress of the plaintiffs would be greatly impeded by the doctrine of *res judicata*. In my judgment, the twin issues of limitation and jurisdiction would be subservient to the doctrine of *res judicata*. There must be a finality to court proceedings. I repeat that encl. 30 should be allowed with costs. Be that as it may, the right forum to adjudicate the dispute must surely lie with the registrar general of cooperative societies.

In the alternative, a submission was advanced that even if limitation applied the claim by the plaintiffs was not a specie of laches that attracted limitation because the plaintiffs' claim was in essence merely to gain legal title to which equitable title had already passed to the plaintiffs. Mr. Avinder Singh, learned counsel for the plaintiffs, submitted that the late Daljit Singh had a contractual right to be on the said piece of land and had remained so till his death. That being the case, so the submission went, possession had at all material times remained with the plaintiffs. What was left to be done, so the submission went, was to "clothe the equitable estate with legal title" – to borrow the words of Raja Azlan Shah J (as His Majesty then was) in the case of *Munah v. Fatimah* [1968] 1 MLJ 54, 55. The case of *Munah v. Fatimah (supra)* was quite interesting. It involved an agreement to sell land under an expectancy of title and at p. 55 of the report, Raja Azlan Shah J (as His Majesty then was) had this to say:

> The legal position is that there is an ordinary contract for the sale of land which is not subject to the consideration inherent in commercial contracts. Relying on the contract the plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time, it seems to me, that she was the equitable owner of the said land. What is required now is to clothe the equitable estate with the legal title. She therefore seeks the aid of this court. In my opinion she is well entitled to the relief she claims. The law with regard to an agreement to sell land under an expectancy of title is discussed in my judgment in *Kersah*

La'usin v. Sikin Menan [1966] 2 MLJ 22 and I do not think I can profitably add to what I have there said.

On the issue of limitation, further down the same page of the same judgment, Raja Azlan Shah J (as His majesty then was) aptly said:

> There is the other point raised by counsel on behalf of the absent defendant, that is, that the action is time barred. Without going into unnecessary detail it is sufficient for me to say that the case of *Williams v. Greatrex* [1957] 1 WLR 31, to which reference was made in *Kersah's* case, is against the defendant. It was there said that where a plaintiff is in possession of an equitable estate under a contract substantially executed, so that the object of his action is to clothe himself with the legal estate, time will not run at all as this is not that species of laches which will prevail against the equitable title.

In *Williams v. Greatrex* [1956] 3 All ER 705, the Court of Appeal held that the purchaser was entitled to specific performance of the contract notwithstanding the ten years' delay because (i) the time for completion specified in the contract was not of the essence of the contract; (ii) the purchaser was not barred by laches since he had an equitable title to plots 3 and 4 by virtue of the contract and the fact that he had entered into possession of them, and (iii) there had not been an abandonment of the contract by the purchaser. Denning LJ approached the issue in this way, as seen at p. 708 to p. 709 of the report:

> But then it is said: when the vendor repudiated this contract, surely the purchaser ought to have taken him to court; he ought to have brought an action for specific performance then and there to compel him to perform his contract. I confess that argument did appeal to me at one time in the course of the case. A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: Once the purchaser went into possession of the land, having the contractual right to be there, he had not only an equity to be there. He had more. He had the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he did not lose his rights simply by not proceeding at once for specific performance.
>
> In *Crofton v. Ormsby* (1) ((1806), 2 Sch. & Lef. 583), LORD REDESDALE, Lord Chancellor in Ireland, said (*ibid.*, at p. 603):
>
> > The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for forty or fifty years, without clothing it with the legal title. I conceive, therefore, that possession having gone

> with the contract, there is no room for the objection … But, in the present case, there is nothing but a resting on the equitable estate by a person in possession, without clothing it with legal title, which I think never was held to be that sort of laches that would prevent relief.

Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar.

Hodson, LJ writing a separate judgment agreed with Denning LJ and this was what his Lordship said at p. 711 of the report:

What is the position if the purchaser was in possession? In FRY, L.J.'s book on *SPECIFIC PERFORMANCE* (6th Edn.) (not, of course, edited by him), para. 1110 reads:

> Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court …

The authority for that proposition is stated to be that of LORD REDESDALE in *Crofton v. Ormsby* (1) ((1806), 2 Sch. & Lef. 583), to which reference has been made. The passage continues:

> … for the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected.

At p. 712 of the reports, Hodson LJ continued:

COTTON, L.J., in *Mills v. Haywood* (2) ((1877), 6 Ch.D. 196) commenting on *Clarke v. Moore* (4) one of the lease cases to which we were referred, said (6 Ch.D. at p. 202):

> In such a case as, e.g., where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right.

It is interesting to note that Raja Azlan Shah J (as His majesty then was) in *Kersah La'usin v. Sikin Menan* [1966] 2 MLJ 20 applied the case of *Williams v. Greatrex (supra)* in dealing with the issue of laches and this was what His majesty said at p. 23 of the report:

It may be argued, perhaps, in due course, that laches or delay may be a bar to the personal representative's claim. In answer I would rely on the case of *Williams v. Greatrex* [1957] 1 WLR 31. I need not go into the details of that

case beyond saying that it was an action for specific performance of a contract for the sale of land simpliciter made 10 years previously. On behalf of the vendor it was argued that when he repudiated the contract the purchaser ought to have brought an action for specific performance then and there to compel him to perform the contract.

In my judgment, relying on the authorities alluded to above there was entirely no basis whatsoever for the defendant to rely on limitation to counter the plaintiffs' claim. Laches cannot simply defeat the plaintiffs' claim. But for the reasons alluded to earlier, especially that part which showed that there was no cause of action as that cause of action had been overtaken by events in that the doctrine of *res judicata*, of which more will be said of this famous doctrine in the later part of this judgment, would demolish the plaintiffs' claims forthwith and accordingly I have no hesitation in allowing encl. 30 with costs.

Enclosure 32 And The Issue Of Jurisdiction

In essence, Mr. S. Kanawagi for the defendant argued that both the 1948 Act and the 1993 Act have effectively ousted the jurisdiction of the courts to deal with disputes between the parties.

It was argued that since the plaintiffs' statement of claim showed that the late Daljit Singh's dispute with IRICHS commenced when the late Daljit Singh was still alive and also at the time when IRICHS was still in existence and that very dispute continued even after the dissolution of IRICHS, then two different sets of laws applied to the two different periods of times. The first period, so it was submitted, covered the period when the late Daljit Singh had a dispute with IRICHS at the time when IRICHS was still in existence and this would extend from 20 December 1950 (the date of incorporation of IRICHS) to 15 July 1982 (the date of de-registration of IRICHS). The second period, so it was submitted, covered the period after IRICHS was de-registered on 15 July 1982 and thereafter.

Mr. S. Kanawagi meticulously argued on these two periods separately and out of deference to him I shall now examine his arguments.

The First Period

It was submitted that the period between 20 December 1950 to 15 July 1982 was governed by the 1948 Act because the 1993 Act only came into force on 22 January 1994 *vide* gazette notification dated 20 January 1994 Jilid 28, no: 2, PU(B) 37. I totally agree that the 1948 Act should be the correct piece of legislation to govern the first period. It was during this time that the late Daljit Singh was still alive and in the course of his dispute with IRICHS he should have referred the dispute to the Registrar-General of Cooperative Societies pursuant to s. 49 of the 1948 Act. That section enacts as follows:

49(1) If any dispute touching the business of a registered society arises – *a*

(a) among members, past members and persons claiming through members, past members and deceased members;

(b) between a member, past member, or person claiming through a member, past member or deceased member, and the society, its Board, or any officer of the society; *b*

(c) between the society or its Board and any officer of the society; or

(d) between the society and any other registered society,

such dispute shall be referred to the Registrar-General for decision. *c*

A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, shall be deemed to be dispute touching the business of the society within the meaning of this subsection.

d

(2) The Registrar-General may, on receipt of a reference under subsection (1) –

(a) decide the dispute himself;

(b) refer it for disposal to an arbitrator or arbitrators; or *e*

(c) require the parties concerned to refer the dispute to a court.

(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar-General within two months from the date of the award and in such manner as may be prescribed.

f

(4) A decision of the Registrar-General under subsection (2) or an appeal under subsection (3) shall be final and shall not be called in question in any civil court.

(5) The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar-General under subsection (3), or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court and shall be enforced in the same manner as if the award had been a judgment of a Sessions Court. *g*

The law of jurisdiction is certainly an interesting subject to deliberate upon. Lord Tenterden CJ in *Doe d. Bishop of Rochester v. Bridges* [1831] 1B & AD 847, 859, 109 ER 1001, 1006 said: *h*

> When an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created but no mode of enforcing its performance is ordained, the common law may, in general find a mode suited to the particular nature of the case. *i*

and this very passage received the approval of the House of Lords in the case of *Pasmore v. Oswaldtwistle Urban District Council* [1898] AC 387, (1895-99) All ER Rep 191 (HL). The House of Lords in *Pasmore (supra)* was faced with the question as to the maintainability of an action for *mandamus* for enforcing the statutory duty of a local authority under s. 15 of the Public Health Act 1875, to provide sufficient number of sewers for draining their district. The available remedy as provided for under s. 299 of the Public Health Act 1875 was by way of enforcing the statutory duty through lodging a complaint to the local Government Board and the House of Lords held that there was no remedy outside the purview of the Public Health Act 1875. The House of Lords emphasised that the obligation was created by the statute and the specific remedy for the enforcement of that obligation rested with the statute alone. This was how Lord Halsbury LC put it (see p. 193 of (1895-99) All ER Rep):

> The principle that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law.

and this very passage too received the approval of the Supreme Courts in *Premier Automobiles Ltd. v. Kamalakar Shantaram AIR* [1975] SC 2238, 2244, 2245 and in *Rohtas Industries Ltd v. Rohtas Industries Staff Union AIR* [1976] SC 425, 435.

The plaintiff in *Cutler v. Wandsworth Stadium Ltd* [1949] 1 All 55, was a book-maker, and he brought an action against the occupiers of a licensed dog racing track for breach of their statutory duty under s. 11(2) of the Betting and Lotteries Act 1934. In construing the Betting and Lotteries Act 1934, the House of Lords held that the obligation imposed by s. 11(2) thereof on the occupier of a track was intended for the benefit of the public and not for the benefit of the book-maker. The House of Lords also held that the statutory duty was only enforceable by way of criminal proceedings as provided for under the Betting and Lotteries Act 1934, and not by way of a civil action. In adverting to the argument that the principle as enunciated in *Doe d. Rochester's* case which was subsequently approved in *Pasmore's* case had no application in a situation where the statutory remedy was by way of a criminal proceeding, Lord Simonds had this to say at p. 548 of the report:

> I see no ground for this distinction. The implication is, if anything in the opposite direction. For the sanction of criminal proceedings emphasises that this statutory obligation; like many others which the Act contains, is imposed for the public benefit and that the breach of it is a public and not a private wrong.

In the same vein, Lord Du Parcq observed at p. 550 of the report:

> I do not agree with the submission of the counsel for the appellant that it is heretical to regard criminal proceedings which may be followed by fine and imprisonment as a specified manner of enforcing a duty. I think that it is both orthodox and right so to regard them.

The Federal Court in *Metal Industry Employees Union v. Registrar of Trade Unions & Ors* [1976] 1 MLJ 220 FC had occasion to consider the issue of jurisdiction. In that case the appellants sought to represent the workmen of the Selangor Pewter Company Sdn Bhd. The Registrar of Trade Unions ruled that the workmen of the Selangor Pewter Company Sdn Bhd were not engaged in an industry or trade similar to that of workmen represented by the appellants. The appellants then sought by way of originating summons certain declarations including a declaration that the Registrar of Trade Unions was not empowered under s. 2(2) of the Trade Unions Ordinance 1959 to rule that the workmen of the Selangor Pewter Co. Sdn Bhd could not properly be members of the appellants' union. The High Court judge dismissed the application and the aggrieved appellants appealed to the Federal Court. In dismissing the appeal, the Federal Court held that the learned High Court judge was right in declining to exercise his discretion to make the declarations as the statutory remedy of appeal was said to suit the case and it would satisfactorily dispose of the dispute. Lee Hun Hoe CJ (Borneo) in a separate judgment applied *Pasmore's* case and also the case of *Wilkinson v. Barking Corporation* [1948] 1 KB 721, 724. In applying *Wilkinson's* case, Lee Hun Hoe CJ (Borneo) relied on a passage of Asquith LJ which reads as follows (see p. 221 of Lee Hun Hoe CJ (Borneo)'s judgment):

> ... It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others.

Lee Hun Hoe CJ (Borneo) in *Metal Industry Employees Union v. Registrar of Trade Unions & Ors (supra)* at p. 222 of the report referred to a text book writer by the name of Zamir and this was what his Lordship said:

> Zamir of *The Declaratory Judgment* at page 230 on Statutory Remedies observed that:
>
> > In cases where a specific remedy is provided by legislation it may be presumed that the Legislature even if not excluding the power of the High Court to grant declaratory relief, has intended that the prescribed remedy, and not any other, should ordinarily be pursued. Indeed, in such cases the court is generally disinclined to exercise its declaratory jurisdiction in the absence of special circumstances.

In *Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41 FC, there was an adequate alternative remedy and the court refused to grant the

declaration. In that case the applicant had applied for a declaration, *inter alia*, that the resident's native court was *functus officio* and without jurisdiction to hear the case by way of an appeal. The applicant also advanced an argument that the purported judgment delivered by the resident's native court was null and *void*. The applicant, however, did not pursue his right of appeal to the Native Court of Appeal and the High Court refused the application for a declaration and being aggrieved the applicant appealed to the Federal Court. In dismissing the appeal, the Federal Court held that as the applicant had not pursued the alternative remedy available to him by way of an appeal to the Native Court of Appeal, the High Court was right in refusing to make the declaration. Gill FJ delivering the judgment of the Federal Court had this to say at p. 45 of the report:

> In the present case, as I have already stated, an appeal lay from the Resident's native court to the Native Court of Appeal. That Native Court of Appeal is presided over by a judge of the High Court and must therefore be considered a court which is competent to decide any question of law. The fact that the decision of the presiding judge on a question of law could be overridden by other members of the court is beside the point. The question of crossing that bridge would arise only when the bridge is reached. In so far as his complaint against the quashing by the Resident's native court of the order made in his favour by the district court was concerned, the plaintiff should have appealed to the Native Court of Appeal instead of going to the High Court. As regards his right to prosecute such appeal, the plaintiff, ironically, will now find himself in the same position as the first defendant when he failed to appeal to the Resident's native court within the prescribed time. The High Court in striking out the portions in his writ of summons and the statement of claim in relation to the declarations sought expressly left it open to the plaintiff to pursue his claim for damages on grounds of conspiracy.

Rahmah Hussein J in an unreported judgment *vide* civil suit no: F379 of 1984 referred to in the early part of this judgment applied vigorously *Doe d. Rochester's* case, *Pasmore's* case, *Wilkinson's* case and the decision of Wan Suleiman FJ, (as he then was) in *Metal Industry Employees Union v. Registrar of Trade Unions & Ors* [1976] 1 MLJ 80 to arrive at the conclusion that she had no jurisdiction to hear the plaintiffs' application in that case. I certainly agree with the decision of her Ladyship.

In *RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309 SC, Harun Hashim SCJ (as he then was) held that since the respondents had already made a complaint to the Director-General of Industrial Relations and the matter was still pending, the High Court should not have interfered.

Using these authorities as guidelines, the specific remedy available to the plaintiffs under s. 49 of the 1948 Act must be resorted to. That in my judgment was an adequate remedy for the plaintiffs to resort to and this court,

consequently, had no jurisdiction to adjudicate on the matter. The Registrar-General of Cooperatives Societies by statute was empowered to handle the dispute between the parties and this court should not enter into the arena at all. Section 49 of the 1948 Act expressly uses the words: "If any dispute touching the business of a registered society" and that dispute must surely refer to the dispute at the point of time before the dissolution of IRICHS with the late Daljit Singh when the latter was still alive. The Supreme Court in the case of *M. Arulandan v. Malaysian Co-operative Insurance Society Limited* [1987] 1 CLJ 43 gave a wide meaning to the words "touching the business of a registered society" that appeared in s. 49 of the 1948 Act. The headnote of that case bore the following recital:

> The words 'touching the business of a registered society' must be given their full import, bearing in mind the object of the legislation. Taking the dictionary meaning of the word 'touching' it indicates that the dispute need not directly arise out of the business of the society, but that it is enough that it should have reference or relation to or concern the business of the society. (*Madhava Rao v. Surya Rao* [1954] AIR Madras 103*).*

The headnote further contained the following passage:

> Since the appellant was the aggrieved party the reference should have been made by him. Under section 49 (2) of the Act, the Registrar General, on receipt of such reference, may require the parties concerned to refer the dispute to Court. So the appellant may bring an action in the Court only if the Registrar General required the dispute to be referred to the Court.

It is interesting to note that Kang Hwee Gee J in deciding *Thanaraj a/l Manikam & Ors v. Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82 also applied the case of *Madhava Rao v. Surya Rao (supra)* and concluded as follows (see p. 89 of the report):

> It is the province of the legislature to enact statutes, and of the courts to construe the statutes which the legislature has enacted. It is clear to me that given the wide meaning that has been ascribed to the term by the Supreme Court in the case cited, the disputes that arose from the sale and purchase of the lands by the plaintiff members from the defendant co-operative society were disputes touching on the business of the society.

Hashim Yeop A. Sani J (as he then was) in *Professor Dr A. Kahar Bador & Ors v. N Krishnan & Ors (No 2)* [1983] 1 MLJ 412 had occasion to adjudicate on disputes among members of the co-operative society and his Lordship was of the view that such disputes should properly be referred to the registrar-general of co-operative societies and for that reason his Lordship set aside the writ. At p. 414 of the report, his Lordship had this to say:

> The dispute described in section 49(1) of the Ordinance is any dispute "touching the business" of the Society. I interpret the words "the business of

the Society" widely to include generally the running of the affairs of the Society. In my view the idea behind section 49 of the Ordinance is obviously to enable the Registrar-General to settle disputes relating to the internal affairs of the Society first before such dispute is allowed to come to the courts. This is clearly seen in the provision made in sub-section (2) of section 49 which reads as follows:

The Registrar-General may, on receipt of a reference under subsection (1) of this section –

(a) decide the dispute himself;

(b) refer it for disposal to an arbitrator or arbitrators; or

(c) require the parties concerned to refer the dispute to a court.

Where the intention of the legislation is clear for a preference for a domestic remedy first then this privilege should be allowed and the court should be slow to interfere in the first instance.

Continuing at the same page of the same judgment, his Lordship referred to the decision of Salleh Abas FJ and said:

In *Subramaniam v. Tan Lee Leng & Ors* [1980] 1 MLJ 171 the plaintiff applied for a declaration that the election of the defendants to the Management Committee of Co-operative Society was null and *void*. The matter there had in fact been referred to the Registrar-General and he had stated that the dispute be referred to the court in accordance with section 49(2)(c) of the Ordinance. The defendants however, applied to the court to have the writ set aside. Salleh Abbas, FJ dismissed the application. At page 172 he said:

> There is no need for me to refer to any authorities to decide this case as I take it that the law on this matter is very clear, in that the court will not entertain any judicial proceedings where remedies provided for by statute have not been complied with.

In my view the disputes in this case are disputes which should properly be referred to the Registrar-General.

It was part and parcel of my judgment, that the prevailing dispute between the parties should be referred to the Registrar General of Cooperative Societies.

The Second Period

After the dissolution of IRICHS on 15 July 1982, the 1993 Act would come into play. Section 74 of the 1993 Act enacts that if the registration of a registered society is revoked under s. 71 or s. 72, the registrar-general may appoint a competent person to be liquidator of the registered society. The powers of the liquidator are set out in s. 75(1)(a) to (p) of the 1993 Act. Under s. 75(3) of the 1993 Act a liquidator may refer any dispute to the

registrar-general, and in relation to such dispute s. 82 shall apply as if such dispute were a dispute touching the business of a registered society. Under s. 75(5) of the 1993 Act, a liquidator shall, every three months, or at such lesser intervals as the registrar-general may direct, submit to the registrar-general a report stating the progress made in winding up the affairs of the society, and shall, on completion of the liquidation proceedings, submit a final report and make over to the registrar-general, all books registers and accounts belonging to the society and all books and accounts relating to such proceedings kept by him. Of crucial importance would be s. 82(1) of the 1993 Act which are similarly worded with that of s. 49(1) of the 1948 Act where disputes shall be referred to the registrar-general for decision. The learned authors by the names of B.J. Surridge and Margaret Digby in their book entitled *"A Manual of Co-operative Law And Practice"*, 4th edn, at p. 186 laid down the general philosophy in regard to disputes under cooperative law in these words:

> The object of the Law is to encourage 'the promotion of thrift, mutual help and self-help among agriculturists, artisans and other persons with needs in common,' and in order to avoid lengthy and often expensive law suits, a special procedure for the settlement of disputes is provided in the Law. There is no choice in the matter. All disputes shall be referred to the Registrar for decision.

and that general philosophy still holds good today. The ouster provisions in both the 1948 Act and the 1993 Act must be vigorously applied in favour of the defendant. When so applied, the plaintiffs' statutory remedy should lie with the registrar-general of co-operative societies. This was my judgment and I so hold accordingly. On the question of jurisdiction, the SAR rightly decided that the court had no jurisdiction to hear the matter. In this context, the appeal by the plaintiff in encl. 32 must therefore be dismissed with costs.

Since I have ruled that the plaintiffs' claims were not statute barred and that the plaintiffs' statutory remedies were entirely with the registrar general of cooperative societies, it was now entirely up to the plaintiffs to decide on their next course of action. In *Professor Dr. A. Kahar Bador & Ors v. N. Krishnan & Ors (No 2) (supra)*, the application to set aside the writ was allowed by Hashim Yeop A Sani J, and now the defendant wants to proceed on this course of action. It would be pointless for the plaintiffs to proceed against the defendant in the civil court as it would be outside the domain of the civil court to adjudicate on the disputes between the parties even though the axe of limitation had yet to fall on the plaintiffs. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 SC, Mohamed Dzaiddin SCJ speaking for the then Supreme Court in lucid language explained the ramifications of O. 18 r. 19(1) of the RHC at p. 43 of the report:

The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per *Lindley MR in Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd)* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

In *Arah Cipta Sdn Bhd v. Kian Kee Sawmills (M) Sdn Bhd* [1997] 2 MLJ 513 CA, Mahadev Shankar JCA in a separate judgment said at p. 517 of the report:

The relevant words in O 18 r 19(a) are:

The Court **may** … *order* to be struck out *or* **amended** any pleading … on the ground that –

(a) it discloses no reasonable cause of action . (Emphasis added).

The practice which should be followed in such cases is stated in the Supreme Court Practice 1995 Vol 1 Part 1 at para 18/19/3:

… Indeed, the court will generally give leave to amend a defect in pleading rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided.

Gopal Sri Ram writing a separate judgment in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565, had this to say at p. 588 of the report:

There is no dearth of authority dealing with the approach that a court should take when exercising its summary jurisdiction under O. 18 r. 19. The unanimous view is that the summary power ought not to be invoked save in a plain and obvious case: see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Bhd* [1993] 3 MLJ 36, per Mohd Dzaiddin SCJ (now FCJ).

The upshot of it all would be that the plaintiffs' writ should be set aside forthwith.

Out of deference to the parties, I will now proceed on the other issues raised before me in the course of these two appeals.

Res judicata

I have alluded to the decision of Rahmah Hussein J in civil suit no: F379 of 1984 where her Ladyship struck out the plaintiffs' action in that case on the ground that the court had no jurisdiction to hear the case. The plaintiffs in that case then appealed against the decision of Rahmah Hussein J to the Court of Appeal *vide* civil appeal no: W02-111-95, but eventually the plaintiffs withdrew their appeal. This meant that the decision of Rahmah Hussein J stood unscathed as far that plaintiffs were concerned.

The plaintiffs in civil suit no: F379 of 1984 having lost their case before Rahmah Hussein J, took a different course of action. They engaged new lawyers who filed and commenced the same suit before RK Nathan J *vide* civil suit no: S2-24-696-98. RK Nathan J promptly dismissed the plaintiffs' action on 2 February 1999 without delivering a written judgment.

Now, obviously the plaintiffs in civil suit no: F379 of 1984 and that of civil suit no: S2-24-696-98 were the same individuals or personalities. But the present plaintiffs are entirely new characters. I will now elaborate further. In civil suit no: F379 of 1984 the parties were:

BETWEEN

(1) KARTAR KAUR (F)

(2) KRISHNAN DEVI (F)

(BOTH ADMINISTRATRIXES OF THE ESTATE OF ONE HAZARA SINGH, DECEASED) … PLAINTIFFS

AND

(1) EMILE JOSEPH

AS THE OFFICIAL LIQUIDATOR APPOINTED UNDER THE COOPERATIVE SOCIETIES ACT, 1948 FOR THE IPOH ROAD INDIAN CO-OPERATIVE HOUSING SOCIETY

(2) MAHENDRA D/O SUCHA SINGH AND AJIT SINGH S/O MILKHA SINGH

(ADMINISTRATRIX AND ADMINISTRATOR OF THE ESTATE OF DALJIT SINGH S/O MILKA SINGH, DECEASED)

… DEFENDANTS

Whereas in civil suit no: S2-24-696-98 the parties were :

BETWEEN

(1) KARTAR KAUR (f)

(2) KRISHNAN DEVI (f)

(Kedua-duanya sebagai pentadbir bagi Hazara Singh, simati)

… PLAINTIFFS

AND

EMILE JOSEPH

(sebagai Pemegang Amanah Raya yang dilantik di bawah Akta Koperasi, 1948 bagi Ipoh Road Indian Co-operative Housing Society Ltd)

… DEFENDANT

From the above recitals, it can be seen that the first defendant in civil suit no: F379 of 1984 was not only the sole defendant in civil suit no: S2-24-696-98 but also the sole defendant in the present proceedings. The second defendant in civil suit no: F379 of 1984 involved two personalities and they are now the present plaintiffs in the present proceedings. It was because of these similarities that Mr. S. Kanawagi argued that the doctrine of *res judicata* should be applied vigorously in favour of the defendant in the present proceedings.

The law journals are replete with authorities on the doctrine of *res judicata*. I shall refer to three of them not in their order of priority. For a start, I shall refer to the case of *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 CA, a decision of Gopal Sri Ram JCA. At p. 489 to p. 490, his Lordship said:

> With respect we are of the view that there is no merit in this argument. In our judgment, the doctrine of *res judicata* in its wider sense provides a complete answer to counsel's submission. It is sometimes referred to as 'onstructive *res judicata*' 'issue estoppel' or 'cause of action estoppel', depending upon the particular subject matter to which it is to be applied. It is a doctrine of great antiquity and reflects the role of equity in the field of adjectival law. The most authoritative statement of the doctrine is to be found in the judgment of Wigram VC in *Henderson v. Henderson* [1843] All ER Rep 378 at pp 381-382:
>
> > [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence,

> or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

The point has been considered very recently by the Federal Court in *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193, where all the relevant authorities upon the subject were considered and discussed in both the majority judgment of Chong Siew Fai CJ (Sabah & Sarawak) and the dissenting judgment of Mohammed Dzaiddin FCJ.

The rule in *Henderson v. Henderson* applies not only to separate proceedings but also to subsequent stages of the same proceeding. In *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 the defendant applied to strike out the plaintiffs statement of claim on certain grounds. That application was dismissed by Chang Min Tat J (as he then was). Later, the defendant took out another application to strike out the action based on grounds different from those relied upon in his earlier summons. It was held that the defendant's second application was barred by the doctrine of *res judicata*. Sharma J, when dismissing the second summons said (at p. 76):

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 ChD 182, *Hook v. Administrator-General of Bengal and Others* 48 IA 187 and *In the matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141 at pp. 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalaayya* [1931] 58 IA 381).

Continuing on the same page and spilling over to p. 491 of the report, his Lordship said:

> In a later passage in the same judgment, the learned judge is reported as saying at p 76:
>
> > The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the court

a was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that b the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided. It constitutes but a part of the prayer in the former application. It was not collaterally or incidentally but directly and substantially in issue when encl. 9 was heard and decided. The answer to the matter is simple. The defendant's only c remedy was by way of an appeal against the decision of Mr Justice Chang Min Tat. The matter was heard on merits and finally decided. It is not capable of re-adjudication by the same court in the same suit. The defendant could certainly reagitate the matter before the Federal Court if the plaintiff finally succeeds in obtaining judgment and an d appeal is filed against that judgment. *The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which was directly and substantially in issue in the earlier application (encl. 9) in this very court.* If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent e stages of the same proceedings in the same court and cannot be reopened in that court. In my view an erroneous decision irrespective of whether it is on a question of law or fact operates as *res judicata* between the parties to it. The correctness or otherwise of a judicial decision seems to have no bearing upon the question whether it operates as *res judicata* or not. Until that decision is reversed or set aside on appeal its finality f and binding force remain operative on the parties. (Emphasis added.)

In our view, no criticism may be made of; and we find no reason to disagree with the statement of principle by so eminent a judge, well known for his mastery of the law governing civil procedure. This court has, in a previous decision, applied the principle enunciated by Sharma J. See *Hartecon JV Sdn* g *Bhd & Anor v. Hartela Contractors* Ltd [1996] 2 MLJ 57.

Next, it would be the speech of Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler & Ors* (No 2) [1967] 1 AC 853 where his Lordship explained the doctrine of *res judicata* at p. 933 to p. 934 of the report in these refined words:

h As originally categorized, *res judicata* was known as 'estoppel by record'. But as it is now quiet immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decision, this nomenclature has disappeared and it may be convenient to describe *res judicata* in its true and original form as 'cause of action estoppel'. This has long been recognized as operating as a complete bar if the necessary conditions are i present. Within recent years the principle has developed so as to extend to what is now described as 'issue estoppel', that is to say, where in a judicial decision

> between the same parties, some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per *rem judicatam.*

Finally, it would be the case o*f Wong Sai Tack v. Chien Hon Keong* [2000] 1 CLJ 195, [2000] 5 MLJ 74, [2000] 1 AMR 655. In that case, I have examined the law on *res judicata* in extenso and I said (see p. 201 for CLJ, p. 79 for MLJ and p. 662 for AMR):

> The doctrine of *res judicata* is based on public convenience. Lord Blackburn in *Lockyer v. Ferryman* (1877) 2 App Cas 519 (HL) had this to say at p. 530 of the report:
>
> > The object of the rule of *res judicata* is always put upon two grounds the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause.

On the authorities and on the facts of the present proceedings, I have no choice but to rule that the doctrine of *res judicata* should be applied in favour of the defendant. There should be an end to litigation. Vexatious litigations would certainly be against public policy. The plaintiffs' writ must be struck out forthwith.

Conclusion

The appeal in encl. 30 by the defendant should be allowed with costs. An ancillary order was also made and that would be to set aside the writ forthwith. On the other hand, the appeal in encl. 32 by the plaintiffs was dismissed with costs. This court had no jurisdiction to adjudicate on the matter. The domain of adjudication was with the registrar general of cooperative societies. The doctrine of *res judicata* must be applied to the detriment of the plaintiffs.

In the course of delivering this judgment, Mr. S. Kanawagi drew my attention to the undertaking as to damages which the plaintiffs gave to James Foong J on 10 October 1998 when the plaintiffs obtained an interlocutory injunction by consent. By consent too and before James Foong J that interlocutory injunction was extended until the hearing and final disposal of encls. 30 and 32. Mr. S. Kanawagi submitted that since the court had struck out the plaintiffs' writ, the undertaking as to damages by the plaintiffs must be ordered to be assessed by the SAR. Mr. Avinder Singh Gill, in fine style, agreed with the submissions of Mr. S Kanawagi. I accordingly ordered that the undertaking as to damages to be given effect and the SAR to assess damages accordingly.